IN THE SUPREME COURT OF MISSOURI

STATE EX REL.	)	
FIRSTPLUS HOME LOAN OWNER	)	
TRUSTS 1998-1 and 1998-2	)	
	)	
Relators,	)	
	)	**Case No. SC 85037**
vs.	)	
	)	
THE HONORABLE DAVID W.	)	
RUSSELL, CIRCUIT JUDGE,	)	
	)	
Respondent.	)	

REPLY BRIEF OF RELATORS FIRSTPLUS HOME LOAN OWNER TRUSTS 1998-1 AND 1998-2

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

INTRODUCTION

This case turns on two principal issues: (1) are unincorporated business trusts that do not make loans, do not accept deposits, and do not do most of the things banks do, nevertheless "moneyed corporations" for purposes of the six-year limitations statute in R.S.Mo. § 516.420; and (2) even if a separate defendant, a mortgage company that makes loans secured by real estate, could be considered a "moneyed corporation," which relators deny, should relators be subject to the same statute of limitations that applies to the mortgage company simply because they were ultimate purchasers of loans that the mortgage company originated?

1. The Appropriate Standard of Review is *De Novo*.

The trial court decided the limitations issue on a motion for judgment on the pleadings, the equivalent of a motion to dismiss. The trial court most certainly did not deny the motion because there were undeveloped facts; to the contrary, it relied on the facts alleged and the matters of record the parties submitted. *Yahne v. Pettis County Sheriff Dep't,* 73 S.W.3d 717, 719 (Mo. Ct. App. W.D. 2002). Moreover, it is manifestly improper for plaintiffs to now rely on new "facts" and matters not submitted to the trial court. *See, e.g., Sleater v. Sleater*, 42 S.W.3d 821, 822 n. 1 (Mo. Ct. App. E.D. 2001); *State ex rel. Ford Motor Co. v. Westbrooke,* 12 S.W.3d 386, 392-93 (Mo. Ct. App. S.D. 2000) (same rule applies in prohibition proceedings). Plaintiffs did not argue in the trial court that the record was undeveloped or that there were facts in dispute, and they should not be allowed to do so in this Court either.

2. Respondent Has Not Established that Relators are Moneyed Corporations as Defined in *Walton Construction*.

It does not elevate form over substance to suggest that when the Legislature used the word "corporation," it did not mean "business trust." In Missouri, we presume the Legislature knows how the laws are being interpreted, and that it means what it says. *See, e.g., Centerre Bank of Crane v. Director of Revenue*, 744 S.W.2d 754, 760 (Mo. 1988).

Faced with explaining how an unincorporated trust could possibly be a "corporation," respondent tries unsuccessfully to create doubt. Contrary to respondent's suggestion, however, statutory business trusts did in fact exist when R.S. Mo. § 516.420 was enacted. As shown by one of respondent's own cases, *State Street Trust Co. v. Hall*, 41 N.E.2d 30, 34 (Mass. 1942), such trusts "have been recognized for many years as a common and lawful method of transacting business;" the *Hall* court in fact noted the "great body of law" with respect to such trusts, beginning with its decision in *Alvord v. Smith*, 5 Pick. 232 (1827).

Respondent cites *Hall* and *Swartz v. Sher*, 184 N.E.2d 51 (Mass. 1962), for the proposition that "several courts have held that a business trust falls within the legal definition of a corporation for purposes of state corporation laws and taxation." But neither case supports such a sweeping generalization. The issue in *Hall* was whether minority owners of interests in a business trust could compel dissolution of the trust. While the court noted that "a business trust has for many purposes been regarded as a *partnership* and some of the principles of the law governing *partnerships* have been applied to them," *id.* at 31 (emphasis added), it recognized that such trusts were neither partnerships nor corporations, but rather entities *sui generis*.[1] The sole issue in *Swartz* was whether a business trust was a recognized entity that

[1]While the business trust in *Hall* was said to be "taxed as a corporation upon its income (continued...)

could pass clear title to real estate. *Id.*, 184 N.E.2d at 54-55. The court in *Swartz* specifically stated, *id.* at 53: "[t]o be sure such trusts are not corporations...."

Respondent similarly struggles in trying to characterize relators as "moneyed." Respondent cites *Securities Industry Ass'n. v. Clarke*, 885 F.2d 1034 (2d Cir. 1989), for the proposition that issuing asset-backed notes is an activity "falling within the 'incidental powers' of a bank." (Resp't Br. 62). But the issue in *Clarke* was whether a national bank that issued such notes was violating section 16 of the Glass-Steagal Act, 12 U.S.C. §§ 24, 378(a) (1982), which prohibited commercial banks from engaging in activities traditionally undertaken by investment banks. Nothing in *Clarke* says that an entity that issues asset-backed notes has "banking powers" for the purposes of R.S.Mo. § 516.420.

In fact, 12 U.S.C. § 24 suggests that relators in fact do *not* exercise banking powers. The statute lists the "incidental" powers Congress regarded as "necessary to carry on the business of banking:"

> [1] discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; [2] receiving deposits; [3] buying and selling exchange, coin, and bullion; [4] loaning money on personal security; and [5] obtaining,

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[1](...continued)
under an act of Congress...," *id.* at 33, the relator trusts' indentures specifically state that relators "will not be characterized as an association....taxable as a corporation." (Resp't App., Suggestions in Opposition to Petition for Writ of Prohibition, Tab. 25, p. 15, para. (I)).

> issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.[2]

A review of relators' organizational documents – (*see* App. to Br. of Relators at A059) – shows that at most, relators issue notes and residual interest certificates. Although these are activities that *any* company can undertake, all companies certainly are not "moneyed corporations." *See, e.g., Walton Construction*, 984 S.W.2d at 154 (rejecting the argument that all for-profit corporations are "moneyed").[3] Moreover, 12 U.S.C. § 378(a)(1) makes it clear that the bright line between commercial and investment banking is accepting deposits, something relators do not do. That section provides that it is unlawful:

> [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or

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[2]Title 62 of the Revised Statutes referred to here was in the original "this Title," consisting of §§ 5133 to 5243, which are now codified in a number of sections of National Bank Act. Most of these sections deal with capitalizing national banks and bank holding companies, a topic that does not involve relators.

[3]Respondent's position also completely ignores the court's holding in *Retailers Collateral Security Trading Corp. v. State of New York*, 176 N.Y.S.2d 429 (App. Div. 1958), which relators cited in their opening brief. (*See* Br. of Relators at 24, n. 11). The court's holding in *Retailers Collateral* recognized that just because a company made loans did not mean it was "subject to the banking laws" such that it qualified as a moneyed corporation. *Id.* at 430-31. Respondent failed to address *Retailers Collateral* and the instruction it provides in interpreting the phrase "moneyed corporation."

> distributing, at wholesale or retail, or through syndicated participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor.

Under the National Bank Act, then, the quintessential "banking power" is the power to accept deposits. Relators do not have that power, and do not accept deposits. They cannot be "moneyed corporations."

The other cases on which respondent relies to argue that relators are "moneyed corporations" are readily distinguishable. *Marble Mortgage Co. v. Franchise Tax Board*, 241 Cal.App.2d 26 (1966), is not relevant because it defines a different term ("financial corporation") under the law of a different state (California). In fact, plaintiffs' use of brackets and parentheses[4] to suggest that the *Marble Mortgage* court equated "financial" and "moneyed" is highly misleading – the latter term does not appear in *Marble Mortgage*. The court in *Grice v. Anderson*, 96 S.E. 222 (S.C. 1918), held that a "moneyed corporation" under South Carolina law was "a corporation organized with intention to accumulate wealth," *i.e.*, any corporation "organized for profit." *Id.* at 224. Plainly Missouri does not consider all for-profit corporations to be "moneyed." *Walton Construction*, 984 S.W.2d at 156.

3. Respondent Cannot Show that SMC Lending is a Moneyed Corporation, Either.

[4]Br. of Resp't at 28 & n. 6.

In an attempt to apply a different statute of limitations to relators, respondent argues that the separate defendant SMC Lending is a "moneyed corporation" because it lends money and sells its loans in the secondary market. Respondent is wrong for a number of reasons.

First, neither of these activities fit within the *Walton Construction* definition, a definition that respondent nowhere challenges. Second, the authorities on which respondent relies do not support the assertion that SMC Lending has "banking powers." Relators already explained that *Fielder v. Credit Acceptance Corp.*, 19 F.Supp.2d 966 (W.D. Mo. 1998), dealt not with a mortgage company, but an auto title loan company that "ma[de] loans on pledges," and that *Hobbs v. National Bank of Commerce*, 101 F. 75 (2d Cir. 1900) is distinguishable on two bases. First, the issue in *Hobbs* was whether New York's "moneyed corporation" statute of limitations applied equally to domestic *and foreign* corporations. *Id.* at 75. Second, the court in *Hobbs* had already found that the lender at issue "had power to make loans upon pledges and deposits." *See Hobbs v. National Bank of Commerce*, 96 F. 396, 397 (2d Cir. 1899).

As described above, both *Marble Mortgage v. Franchise Tax Board* and *Grice v. Anderson* are distinguishable because they deal with the law in different states that are not in harmony with Missouri and New York. The same is true of *Morris & Essex Inv. Co. v. Director of Division of Taxation*, 161 A.2d 491 (N.J. 1960), in which the issue was whether a mortgage company was taxable as a "financial business" under a New Jersey statute that defined "financial business" to include any "mortgage financing businesses." *Id.* at 493 (quoting N.J.S.A. 54:10B-2; *The Morris Plan Co. of San Francisco v. Johnson*, 100 P.2d 493 (Cal. Ct. App. 1940) (court defined "financial corporations" as "corporations dealing in money as distinguished from

other commodities.")). That definition is certainly far more encompassing than the definition of "moneyed corporation" adopted in *Walton Construction*.

Respondent also wrongly suggests that New York law – specifically N.Y. Rev. Stat., vol II, L. 1874, Chap. 324 – deems mortgage companies to be "moneyed corporations." In fact, the statute ("An act relative to moneyed corporations...") applies to "[e]very trust, loan, mortgage security, guaranty or indemnity company or association...*which receive deposits of money*..." (italics added). Like the National Bank Act, New York law suggests that unless the entity receives deposits, it is not exercising banking powers.

Respondent also makes the illogical argument that SMC Lending is a moneyed corporation because it is "subject to regulation by the Missouri Division of Finance." Actually, R.S.Mo. § 443.800 *et seq*. only gives the Division of Finance the authority to license and require reports from mortgage brokers. Further, just because the Division of Finance has the power to regulate "the banking business of this state" (R.S.Mo. § 361.020(1)) does not mean that a mortgage broker subject to licensing by the Division of Finance therefore "has banking powers." It makes much more sense to hold that entities that have "banking powers" are those subject to Chapter 362 of Missouri's Revised Statutes, governing banks and trust companies.

Finally, even though respondent has not challenged the *Walton Construction* court's definition of "moneyed corporation," respondent would nonetheless like this Court to hold that when the court of appeals said "pledge," it really meant "mortgage" or, more generally, "collateral." This Court should refuse respondent's invitation. Missouri courts have recognized the distinction between "pledge" and "mortgage" for over 150 years. *See, e.g., Sansone v*.

Sansone, 586 S.W.2d 87, 89 (Mo. Ct. App. E.D. 1979) (citing *Williams v. Rorer,* 7 Mo. 556, 558 (Mo. 1842)).

4. Even if SMC Lending is a Moneyed Corporation, Relators are Entitled to the Protection of Their Own Statute of Limitations.

There is no merit to respondent's argument that, because relators are supposedly "derivatively" liable for SMC Lending's alleged violations, relators cannot raise a limitations defense based on a different statute of limitations. Neither Missouri law on assignments, nor the federal law on which respondents have continually disclaimed relying, support respondent's position. Thus, even if SMC Lending were a "moneyed corporation" – which it is not – that fact would not in any way affect the limitations statute applicable to relators.

First, the merits of respondent's "derivative" liability theory are completely unrelated to which statute of limitations governs respondent's claims against relators. HOEPA, 15 U.S.C. § 1641(d), says that a purchaser of a HOEPA mortgage takes it "subject to all claims and defenses with respect to that mortgage that the consumer could assert against a creditor of the mortgage." It plainly speaks to the *consumer's* defenses to a claim brought by a lender or an assignee, and says that if the consumer has a defense to a claim brought by the original lender (most commonly, for default on the underlying note), the consumer has the same defense against such a claim brought by an assignee because the statute removes the assignee's "holder in due course" defense. *E.g., Vandenbroeck v. ContiMortgage Corp.,* 53 F.Supp.2d 965, 968 (W.D. Mich. 1999).[5] But the statute says absolutely nothing about the *assignee's defense*s to

[5]As noted in relators' opening brief, plaintiffs told the United States District Court for (continued...)

the consumer's claim. In other words, HOEPA may affect the consumer's defenses, and it may remove an assignee's holder-in-due-course defense, but it does not affect the assignee's *other* defenses, such as the statute of limitations.

Nor is there any support for respondent's argument that because the substantive nature of the claim against the lender is the same as that against the assignee, "there by definition cannot be two separate or different periods of limitations" (Resp't Br. 56). This assertion ignores *Nolan v. Kolar*, 629 S.W.2d 661 (Mo. Ct. App. E.D. 1982), in which different statutes of limitations applied to different defendants (a moneyed corporation and natural persons) based on their own particular status.[6] The situation in *Nolan v. Kolar* is not unique. One can easily hypothesize an automobile collision that injures plaintiff, followed by negligence on the part of a health care provider that exacerbates plaintiff's injuries. The plaintiff would have five years to sue the negligent driver, R.S.Mo. § 516.120, but only two years to sue the negligent health care provider under R.S.Mo. § 516.105. In this hypothetical case, as in *Nolan* and the

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[5](...continued)
the Western District of Missouri that they were not relying on HOEPA to do anything except "serve[] as a bar to a holder-in-due-course defense that an assignee defendant may raise." (Br. of Relators at 27).

[6]Respondent is also wrong in asserting that in *Nolan v. Kolar*, the claims against the bank were not based on *respondeat superior*. In *Nolan*, the alleged wrongful acts – giving notes and deeds of trust to plaintiff's husband without notifying plaintiff, and refusing to mark the notes as paid, were done "through [the bank's] agents," including defendant Kolar. 629 S.W.2d at 662.

present case, the statute of limitations can in fact depend on the status of the particular defendant.

Missouri law on assignments in no way makes relators automatically subject to the same statute of limitations that governs the claims against the original lender. Saying that an assignee "stands in the shoes of" the assignor means that the assignee succeeds to the assignor's benefits, but not its burdens. *Haarman v. Davis*, 651 S.W.2d 134, 136 (Mo. 1983) ("The general rule in Missouri is that a mere assignment of rights under an executory contract pertaining to real estate does not cast upon the assignee any of the personal liabilities imposed by the contract upon the assignor"); *Rosemond v. Campbell*, 343 S.E.2d 641 (S.C. 1986) ("absent an agreement to the contrary, the common law assignee takes only the benefits, not the burdens, of the assigned obligation").

This is not a case in which the lender, or its assignee, has sued plaintiffs on the notes underlying their mortgages. If such a suit were brought, and plaintiffs raised a violation of the SMLA as a defense, then the law of assignments (and HOEPA) perhaps might allow the defense even against a plaintiff that acquired the note through an assignment. Such was the situation in the cases on which respondent relies (Resp't Br. 51-52), and therefore those cases are distinguishable.

Respondent also suggests that relators may be liable for SMC Lending's alleged unlawful acts "if they are found to be so closely related to SMC Lending or one another that any or all should be considered one-[and]-the same...or if Relators knew of or participated in the unlawful lending scheme on which the plaintiffs base their claims..., thereby giving rise to a civil conspiracy" (Resp't Br. 52-53). The short answer to this suggestion is that nothing of the sort

has been alleged, nor has a shred of evidence been presented that would support such a claim.[7] There is no allegation that relators are *alter egos* of SMC Lending, nor any basis for such an allegation.

5. Relators Are Entitled to be Dismissed from the Underlying Action Based on the Running of the Three-Year Statute of Limitations.

A. The Continuing Violation Doctrine Does Not Apply.

Respondent contends in this action that the allegedly unlawful fees and points "were not only payable at or before closing, they were in fact 'prepaid' as of the closing." (Resp't Br. 48). This statement is an admission that makes the "continuing violation" doctrine inapplicable, because if the allegedly unlawful fees and points were paid at or before the closing, the wrong occurred and was capable of ascertainment at that time. Therefore, the loan closing date is the date on which the causes of action accrued. *Davis v. Laclede Gas Co.*, 603 S.W.2d 554, 556 (Mo. 1980).[8]

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[7]It is undisputed that relators have no relationship whatsoever with SMC Lending except for the fact that relators bought pools of mortgage loans that included some loans that SMC Lending originated.

[8]The argument that the fees and points were prepaid is just one example of the plaintiffs' continued willingness to take whatever position is convenient at the time, regardless of whether it happens to be entirely inconsistent with a prior position. At the same time they claim the fees and points were *prepaid* to support their interpretation of HOEPA, (Br. of Resp't at 48), plaintiffs assert that the fees and points are *paid over the life of the loan* to

(continued...)

Respondent admits that most of the cases have held that a cause of action for charging allegedly unlawful fees or points in connection with a second mortgage loan accrues when the loan is closed and the fees or points are paid to the originating lender. (Br. of Relators 31-32; Resp't Br. 71). But respondent wants this Court to ignore these cases, and instead follow the unpublished opinion in *Williams v. Zed Corp.*, No. 02-2045-GV (W.D. Tenn., Aug. 15, 2002). The decision in *Williams*, however, should not be followed for two reasons. First, the *Williams* case represents the minority – and less reasoned – position. Second, the court in *Williams* was applying Tennessee, not Missouri, law and was dealing not with a continuing violation doctrine, but rather specific Tennessee statutory language that started the statute of limitations running upon "the commission of the act." (*See* App. to Br. of Resp't at A272). But even if the court had applied the continuing violation doctrine to support its holding, doing so would be inconsistent with application of that doctrine under Missouri law. *See, e.g., Davis*, 603 S.W.2d 554.

B. Respondent's Filing Against U.S. Bank National Association Did Not Make the Action Against Relators Timely.

Relators do not disagree that respondent's substitution of U.S. Bank National Association related back to the original filing against U.S. Bank Trust National Association. This results from a straightforward application of Mo. R. Civ. P. 55.03. But respondent has cited no authority to support the assertion that the later (January, 2002) naming of relators as *additional defendants* related back to the date U.S. Bank National Association was sued.

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[8](...continued)
support their continuing violation argument. (*Id.* at 67-68).

Further, respondent asserts that relators "received notice during the limitations period of the institution of the action and knew or should have known that it was an intended defendant" (Resp't Br. 75), but there is no allegation in the petition nor anything in the record to support this assertion. Indeed, plaintiffs had not even sought any discovery – let alone discovery regarding additional defendants – until *after* the three-year statute of limitations had already run. (*See* App. to Br. of Resp't at A1; App. to Br. of Relators at A2).

C. Defendant Class Tolling Does not Save Respondent's Claims.

Respondent acknowledges that the majority of courts have refused to follow the rule announced in *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603 (7th Cir. 1980), unless the purported class defendants had notice of the lawsuit during the limitations period. Respondent argues that these courts are wrong, and the *Appleton* court correct, but this position is both unconvincing and of doubtful constitutionality.

As respondent would apply *Appleton Electric*, a plaintiff may file a purported defendant class action, give no notice at all to members of the purported defendant class, then add them as defendants years later, long after the statute of limitations (or even a statute of repose) has run. As the court held in the most recent case on the issue, *Meadows v. Pacific Island Secs. Corp.*, 36 F.Supp.2d 1240, 1248-49 (S.D. Cal. 1999), this approach would not be consistent with due process because it would deprive defendants of their right to be notified of the claims against them. That is one thing in a case involving tax assessments where all the taxing authorities knew of the pending dispute, *e.g.*, *White v. Sims*, 470 So.2d 1191 (Ala. 1985), but it is quite another – and quite unfair – in a case like this one in which members of the purported

class may have no notice at all of the fact that they might be sued until well after the limitations period has run.

CONCLUSION

This Court's preliminary writ should be made absolute.

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CERTIFICATE OF COMPLIANCE WITH MO. R. CIV. P. 84.06(b) AND 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Mo. R Civ. P. 84.06(b) and, according to the word count function of Word Perfect by which it was prepared, contains 3,702 words, exclusive of the cover, Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing this Reply Brief of Relators in electronic form complies with Mo. R. Civ. P. 84.06(g), because it has been scanned for viruses and is virus-free.

_____
Attorney for Relators

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document and a floppy disk containing a copy of same, was sent via U.S. Mail, postage prepaid this 14th day of May, 2003 to:

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